

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG**

BRANDON JOHNSON

Petitioner,

v.

**CIVIL ACTION NO. 3:13-CV-133
(JUDGE GROH)**

MARVIN C. PLUMLEY, Warden,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

On this day, the above-styled matter came before the Court for consideration of the Report and Recommendation of United States Magistrate Judge John S. Kaull. Pursuant to Rule 2 of the Local Rules of Prisoner Litigation Procedure, this action was referred to Magistrate Judge Kaull for submission of a proposed Report and Recommendation ("R&R"). Magistrate Judge Kaull filed his R&R [Doc.23] on July 8, 2014. In that filing, he recommended that this Court grant Respondent's Motion for Summary Judgment [Doc. 15] and dismiss with prejudice Petitioner's petition filed under 28 U.S.C. § 2254.

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. Thomas v. Arn, 474 U.S. 140, 150

(1985). In addition, failure to file timely objections constitutes a waiver of de novo review and the petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984).

In this case, objections to Magistrate Judge Kaull's R&R were due within fourteen days after being served with a copy of the R&R pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. Petitioner was served with the R&R on July 10, 2014. To date, the parties have not filed any objections. Accordingly, this Court will review the R&R for clear error.

On September 23, 2013, Petitioner Brandon Johnson filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his state court conviction in the Ohio County Circuit Court, West Virginia on the following five grounds: (1) that "[t]he Court lowered the burden of proof by instructi[ng] the jury that [he] did not have to have same criminal intent as the main pe[r]petrator of the robbery"; (2) that his counsel was ineffective for failing to impeach a witness with inconsistent statements; (3) that there was insufficient evidence to support his conviction; (4) that counsel was ineffective for failing to offer a lesser included offense of larceny; and (5) that counsel was ineffective for failing to object to the court reporter's failure to transcribe the entire record for the purpose of review on direct appeal.

On October 10, 2013, the Court ordered Respondent to show cause why the petition should not be granted. On December 5, 2013, Respondent filed a motion for summary judgment. Respondent argued that the petition must be dismissed for two reasons:

(1) Petitioner's claims remain unexhausted because he did not give the West Virginia Supreme Court of Appeals an opportunity to address all of his claims and (2) Petitioner's claims should be rejected on the merits because he failed to identify how the state court's rulings on his claims are contrary to, or are an unreasonable application of, clearly established federal law.

On July 8, 2014, Magistrate Judge Kaull issued a R&R that recommended this Court grant Respondent's Motion for Summary Judgment and dismiss with prejudice Petitioner's habeas corpus petition. Magistrate Judge Kaull found that the state decision in Petitioner's case was not contrary to, or an unreasonable application of, clearly established federal law. Additionally, the state court did not base its decision on an unreasonable application of facts. Therefore, Magistrate Judge Kaull recommended that Petitioner is not entitled to habeas relief under 28 U.S.C. § 2254.


Upon careful review of the record, it is the opinion of this Court that Magistrate Judge Kaull did not clearly err and that the Report and Recommendation should be, and is, hereby **ORDERED ADOPTED** for the reasons more fully stated therein. Further, it is ordered that Respondent's Motion for Summary Judgment is **GRANTED** and Petitioner's § 2254 petition is **DENIED and DISMISSED WITH PREJUDICE** and **STRICKEN** from the active docket of this Court.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record and to mail a copy to the *pro se* Petitioner by certified mail, return receipt requested, to his last known address as shown on the docket sheet. Pursuant to Federal Rule of Civil Procedure

58, the Clerk is directed to enter judgment on this matter.

DATED: July 29, 2014



GINA M. GROH
UNITED STATES DISTRICT JUDGE